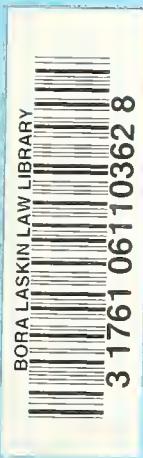




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## Legal Archaeology: Studies in Cases in Context

Volume 1

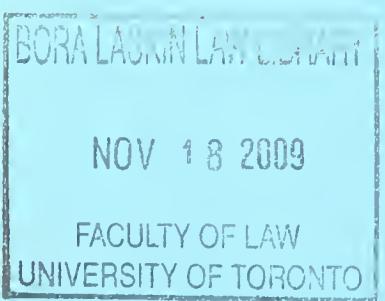
Winter 2010

Professor Angela Fernandez

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FACULTY OF LAW  
UNIVERSITY OF TORONTO

# **Legal Archaeology: Studies in Cases in Context**

**Volume 1**

**Winter 2010**

**Professor Angela Fernandez**

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**Legal Archaeology: Studies in Cases in Context**  
**LAW214H1S**

**Professor Angela Fernandez**

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Second Term: 3 credits; 2 hours  
Classes: FLV, Mon 4:10-6

Have you ever wondered why you read the cases in first year that you did? Who chose those cases? Why did they select them? Where on earth did they find them? Why do some seem like works of fiction rather than things that really happened?

Studies of “cases in context” have been growing in popularity in recent years. Often alternately referred to as “legal archaeology,” these are in-depth studies of leading cases in the law school curriculum, which tell the “behind the scenes” stories of the legal cases in our casebooks. The focus is usually some important dimension of the case left out of the reported decision such as a litigation tactic that had an important impact on the outcome or “found fact” that turns out not to be true at all. Often the case-in-context study focuses on a gender, race, or other “outsider” perspective left out of the usual study of the case.

This course offers an opportunity to learn about this growing field, read examples that display the different uses to which it can be put, and ask about the strengths and weaknesses of this form of legal scholarship.

No prior experience in legal history is needed to take this course; only curiosity required.

Evaluation: The class will be run as part-lecture, part-discussion, with a participation grade for class discussion and two comment papers (5-7 double-spaced pages) worth 30% of the final grade, and a 24-hour one-question take-home examination (10-12 double-spaced pages) worth 70% of the final grade, to be signed out from and returned to the Records Office. The examination may be taken during any 24 hour period, excluding weekends, between the first day of the examination period and due no later than the set deadline for written work in the applicable term. A limited number of students may arrange with the professor to satisfy their SUYRP requirement in the course. If a student is doing the SUYRP, that paper replaces the Take Home exam for 70% of the grade, and the student will still be evaluated on 30% for two comment papers (20%) and participation (10%). The participation grade consists of attendance and input on discussion on a regular basis, as well as a short in-class introduction of one of the course readings on an “on call” day.

Readings for the course are available in a two-volume course packet at the Law School Bookstore and electronically on Blackboard. The *Persons Case* book is also available at the Law School Bookstore.

## TABLE OF CONTENTS

### VOLUME 1

#### I. INTRODUCTION (Class 1, January 4)

#### II. INTRODUCTION TO CASE-IN-CONTEXT STUDIES

##### A. A Trend in Legal Scholarship (Class 2, January 11)

John T. Noonan, Jr., "Foreword" & "Masks of Participants" in *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1975) vii-xiii, 3-28, 171-6. 1

Richard Danzig & Geoffrey R. Watson, "Preface to the Second Edition" & "Introduction" to *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, New York: Foundation Press, 1978) (2d ed. 2004) v, 1-4. 21

A.W.B Simpson, "The Study of Cases" in *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995) 1-12. 24

Descriptions of Foundation Press' Law Stories Series  
(<http://www.westacademic.com/Professors/FoundationPress/ProductLines.aspx?tab=2>). 30

##### B. An Example: Necessity (Class 3 & 4, January 18 & January 25)

Joan Vogel, "Cases in Context: Lake Champlain Wars, Gentrification and *Ploof v. Putnam*," 45 *St. Louis University Law Journal* (2001): 791-815. 32

Paul Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," 60 *New York University Law Review* (1985): 30-62. 45

A.W.B. Simpson, *Cannibalism and the Common Law* (Chicago: University of Chicago Press, 1984) Preface, 1-11, 55-94, 195-223, 225-53, 307-11. 77

#### III. THEORETICAL PERSPECTIVES

##### A. Historiography (Class 5, February 1)

Robert W. Gordon, "Simpson's Leading Cases [Review of *Leading Cases in the Common Law* by A.W. Brian Simpson]," (1997) 95 *Michigan Law Review* 2044-2054. 145

Debora L. Threedy, "Legal Archaeology: Excavating Cases, Reconstructing Context," 80 *Tulane Law Review* (2006): 1197-1238. 151

## B. Legal Canons (Class 6, February 8)

J.M. Balkin & Sanford Levinson, “Legal Canons: An Introduction,” in *Legal Canons*, J.M. Balkin & Sanford Levinson eds. (New York: New York University Press, 2000) 3-44. 172

Angela Fernandez, “An Object Lesson in Speculation: Multiple Views of the Cathedral in *Leaf v. International Galleries*,” 58 *University of Toronto Law Journal* (2008): 481-519. 193

## READING WEEK